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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. HUY QUOC LE, Defendant and Appellant.	H035678 (Santa Clara County Super. Ct. No. CC804205)

Defendant Huy Quoc Le was convicted by a jury of second degree murder (Pen. Code, § 187)[1] which also found that Le had personally used a firearm in the commission of that offense (§ 12022.53, subd. (d)). Le was sentenced to 40 years to life.

On appeal, Le contends: (1) his trial counsel was ineffective for failing to request a pinpoint instruction detailing how evidence of his mental impairment should be considered in evaluating imperfect self-defense; (2) the trial court failed to properly instruct the jury that absence of provocation and imperfect self-defense are elements of murder to be proved by the prosecution; and (3) the trial court erroneously instructed the jury on mutual combat (CALCRIM No. 3471) and contrived self-defense (CALCRIM No. 3472). Le also argues he is entitled to reversal due to the cumulative effect of these purported errors.

As explained below, we find no merit to Le's claims and shall affirm.

[1] Further unspecified statutory references are to the Penal Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Prosecution case

1. The offense

At approximately 9:30 p.m. on December 6, 2007, Le met a group of friends including Thuy Quach, Tracy Ly, Tracy Dao, Uyen Nguyen, Angel Ly, Timmy, Vinh and Nghia,[2] at the Hoang Gia restaurant in San Jose. Their table was next to one occupied by Tony Sam, Jack Mac, Dinh Le, Vincent Dang, Tai Tiet and Rolando DelaCruz. The people at both tables were drinking and eating and appeared to be in good spirits. The restaurant was equipped with security cameras, both interior and exterior, and the recordings from those cameras were played during the trial.

2. Julie Ha

Ha was working as a waitress at the restaurant on the evening of December 6, 2007. At some point, she saw a number of people go out to the front of the restaurant, so she followed them outside to see what was going on. When she was outside, Ha saw Sam being pushed by someone in Le's group. After Sam was pushed, DelaCruz reached over and tried to hit someone in Le's group, but did not connect. She could not recall if DelaCruz's hand was open or if he had made a fist when he swung.

At that time, Le was about three feet in front of Ha, and Ha had both of her hands on his right shoulder to keep him from hitting anyone. Le pulled something out from his stomach area. Ha heard what sounded like a firecracker as Le shot DelaCruz the first time. As DelaCruz lay on the ground, Le shot him twice more. Ha did not see anyone stab DelaCruz, and Le's first shot occurred immediately after DelaCruz tried to hit someone in Le's group.

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[2] The witness, Quach, who testified about who was with Le that night, did not know Timmy, Vinh and Nghia's last names, nor did she know Le's last name. She only knew Le through her friend, Tracy Ly.

When she was initially interviewed by police, Ha denied seeing anything because she was afraid of retaliation if she testified in court. When she learned that DelaCruz had died, however, she told police what happened.

About a month after the shooting, Ha began a relationship with Dinh Le and had a child with him.

3. Jack Mac

Mac was sitting at the table with his friends at about 12:30 a.m. when two men from Le's table approached and asked his friend Sam to go outside to talk. Mac and Tiet followed Sam and the two men outside, as did Dinh Le. Once outside, the two men asked Sam why he called their friend a bitch. Sam denied doing so, and one of the men went back inside to get their friend. When the woman came outside, she asked Sam why he insulted her, and he said he did not recall doing so, but if he did, he was sorry. At that point one of the other men hit Sam in the face. Sam turned around and ran inside the restaurant. DelaCruz, who had come outside too, was trying to keep the other men from attacking Sam, holding his hand out and saying, "No, no." At some point, one of the men from the other table stabbed DelaCruz in the left side of his abdomen and just after that, Le shot DelaCruz.

Mac did not see DelaCruz punch anyone or make any swinging motions with his arms. All he saw was DelaCruz standing with his arms outstretched and his palms facing toward the other group.

When Mac was interviewed by police that evening, he denied having seen anything because he did not want to be involved. A few days later, when the police were looking for him, he told them what he had seen.

4. Dinh Le

Dinh worked with DelaCruz and had known him for 12 or 13 years. They went to the Hoang Gia restaurant together on December 6, 2007, to hang out with friends, as they had often done before. While Dinh was sitting at the table, two men from a neighboring

table came over and asked his friend Sam to step outside. Dinh followed the three men outside a little later because it was late and he wanted to go home. When he got outside, he saw the two men swearing and screaming at Sam. Within 15 seconds, the rest of the people at the neighboring table came running outside as well. Someone pushed or punched Sam, who fell backward. A woman who worked at the restaurant pulled Sam back inside. A few seconds later, Dinh heard a gunshot. Dinh ran into the restaurant to get someone to call 911. When he came back outside, someone told him DelaCruz had been shot.

When Dinh was interviewed by the police that evening, he initially told them he was inside at the time of the shooting. He claimed he was in shock and that the incident "happened so fast, I [could not] remember."

5. Tai Tiet

Tiet said that three people approached the table where he was sitting with his friends and asked Sam to step outside to talk. Tiet and Mac followed Sam outside, and some other people from the other table also came outside. Sam denied insulting the other group's friend, but also said if he did say anything, he was sorry. At that point, a short man in the other group hit Sam in the face. Sam ran back to the restaurant.

Tiet saw Le holding a gun and threatening to shoot. Le said, in Vietnamese, "I'm going to shoot the heck out of you guys." He shot DelaCruz once, ran to the door of the restaurant, then ran back and shot DelaCruz three more times as he lay on the ground.

When Tiet was first interviewed by police that night, he denied going outside and said he did not see anything. Tiet explained that someone from the other group had threatened to shoot them if they said anything to the police. When Tiet learned that DelaCruz had died, he told the police what he had seen.

6. Tony Sam

Sam was sitting at the table with his friends when two men came up to him, slapped him on the shoulder and asked him to go outside to talk. Sam followed the men

outside and one of them said that Sam had called his girlfriend a bitch. The men at one point said something like "Fight me to death" to Sam. Sam denied calling the woman a bitch, and said they should ask her to come outside and see if she was mistaken about his identity. The woman came out and said, "Yeah, that's him," referring to Sam. Sam said he did not know her, but if there was a misunderstanding, he was sorry. Suddenly, a shorter third man ran forward and struck Sam in the chest. One of the waitresses pushed Sam back inside the restaurant, saying "No fighting, no fighting."

7. Thuy Quach

Quach was at the restaurant with her friends, including Le. About two weeks prior, she had encountered Sam, who was sitting at the next table, and he had called her a bitch. When she first noticed him on the night of December 6, 2007, she did not do or say anything, but Sam kept looking at her. At some point, while she was in the bathroom with Tracy Ly and Tracy Dao, she told them what Sam had said to her. Shortly after that, two of the men at her table, Timmy and Nghia,[3] walked over to Sam and "pulled the guy outside to talk." Quach said she thought there would be some arguing and shoving, but nothing more. However, she also said she intended to leave because she thought there might be a fight.

One of her girlfriends pulled her outside and she saw the men arguing. She also argued with Sam, but was not angry and was trying to "diffuse the situation." Her friend, Vinh, was about to hit Sam and Quach tried to stop him. Quach recalls DelaCruz was outside, because he was the only Hispanic in a group of Vietnamese, but otherwise did not pay attention to him. She then heard a gunshot and hid behind a van that was parked

[3] Quach initially testified that Timmy and Le approached Sam, but after viewing the videotape from the restaurant's interior security camera, she said that it was Timmy and Nghia who went up to Sam and asked him to go outside. In that videotape, she acknowledged that Le had gone outside the restaurant just before Timmy and Nghia confronted Sam at the table.

nearby. Quach next got in her car, and as she was driving home, she got a call from Tracy Ly who told her to go to Uyen's house. Ly, who was in a separate car with Uyen, Timmy, and Angel, told Quach to follow them to a convenience store, where they purchased a case of beer. They all then went to Uyen's house, where they met up with Le, Nghia Nguyen, and Hoa Ly. Everyone was drinking, including Le, and talking about what had just happened at the restaurant. Timmy, Nghia, Le, and Vinh told everyone there not to say anything to anyone about the incident. Quach did not talk to the police until they showed up at her workplace some days later to ask her about the shooting.

8. Forensic and other investigatory evidence

According to the medical examiner, DelaCruz weighed 250 pounds and was five feet, nine inches tall at the time of his death. DelaCruz was shot three times; once in the abdomen and once in each thigh. He also had a nonfatal stab wound in his abdomen. The gunshot to his abdomen was fatal, as it caused severe bleeding.

Sergeant Thomas Morales interviewed Le and a recording of that interview was played for the jury. In that interview, Le denied being with a group of people at the Hoang Gia restaurant in December 2007 and denied being in a fight at that restaurant. When shown pictures of the other people with whom he was sitting at the restaurant, Le claimed he did not recognize them and did not know them.

Morales also interviewed Ha, who initially said that DelaCruz had punched Le in the face before he was shot, but a couple of seconds later said she did not know whether the punch actually connected.

B. Defense case

Toxicologist Halle Weingarten testified as an expert in the areas of alcohol and its effects. Weingarten said that alcohol could impair a person's judgment, lower inhibitions and make a person more willing to engage in risky behavior. Alcohol also could intensify a person's preexisting mood and make them more volatile or less stable

emotionally. For example, if someone were in a bad mood before drinking, the alcohol may make it more likely the person would act violently.

Dr. Mark Patterson testified as an expert in psychology in the area of intelligence testing. With the assistance of a Vietnamese language interpreter, Patterson administered several intelligence tests to Le. The tests revealed that Le had a nonverbal intelligence quotient (IQ) score of 84 and an overall IQ score of 73. An IQ score below 70 would signal the possibility of "mental retardation."

Based on these scores and his evaluation of Le, Patterson tested Le's executive functioning and discovered Le had a problem with "cognitive flexibility." This meant Le had difficulty shifting from one response to another when confronted with a change in what was happening around him. A person with such problems would respond in one way, but when the environment changed and the initial response no longer made sense, the person would continue with the initial response regardless. According to Patterson, this problem would also cause a person to have impaired reasoning, impulse control problems and come to snap judgments without pausing to reflect and incorporate new information.

C. Verdict and sentencing

On March 22, 2010, the jury found Le guilty of second degree murder and found true the allegation that he personally used a firearm in the commission of the offense. He was sentenced to a total term of 40 years to life, consisting of a 15-year to life sentence for second degree murder consecutive to a 25-year to life sentence for the firearm enhancement.

II. DISCUSSION

A. Ineffective assistance of counsel

Le argues his trial counsel was ineffective for failing to request a pinpoint instruction regarding how his low intelligence level could have affected whether he acted in imperfect self defense.

1. Background

As discussed above, Le presented expert testimony demonstrating he had an IQ somewhere between 73 and 84, and that a score below 70 would suggest a diagnosis of "mental retardation." Le's expert psychiatrist, Dr. John Greene, clarified that, though he diagnosed Le with borderline intellectual functioning, Le did not fall within the parameters of "mental retardation."

The trial court instructed the jury with CALCRIM No. 571 on imperfect self-defense, as follows:

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self defense or imperfect defense of another. If you conclude the defendant acted in complete self defense or defense of another, his action was lawful and you must find him not guilty of any crime. [¶] The difference between the complete self defense or defense of another and imperfect self defense or imperfect defense of another depends on whether the defendant's belief in the need to use deadly force was reasonable. . . .

"The defendant acted in imperfect self defense or imperfect defense of another if one, the defendant actually believed he or someone else was in imminent danger of being killed or significant [*sic*] great bodily injury. And two, the defendant actually believed that the immediate use of force was necessary to defend against the danger; but three, at least one of those beliefs was not [*sic*] unreasonable.[4] [¶] . . . In evaluating the defendant's beliefs, consider all the circumstances as they were known as appeared [*sic*] to the defendant."

With respect to malice, the court instructed the jury: "There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion or in the

[4] The written instruction provided to the jury reads: "At least one of those beliefs was unreasonable."

actual but unreasonable belief in the necessity to defend oneself or another person against imminent peril of loss of life or great bodily injury."

The court further instructed the jury with CALCRIM No. 3428, concerning the effect of mental impairment on premeditation and malice aforethought:

"You have heard evidence that the defendant may have a low intelligence level. You may consider this evidence only for the limited purpose of deciding whether at the time of the charged crime the defendant acted with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted with the required intent or mental state specifically for meditation [*sic*] and deliberation. . . ."

Finally, the court instructed the jury, "When evaluating self defense, the law does not take into account a person's mental capacity when determining whether he has acted as a reasonable person would have acted."

2. Legal standard

"A defendant seeking relief on the basis of ineffective assistance of counsel must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Price* (1991) 1 Cal.4th 324, 440; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) Where there is no explanation for counsel's choice in the record, counsel may be found ineffective only if there " 'simply [can] be no satisfactory explanation' " for his choice. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

3. Analysis

In this case, there is a satisfactory explanation for counsel's decision not to request a pinpoint instruction: The evidence did not support it. There was no substantial evidence to support the conclusion that Le feared DelaCruz posed an imminent threat of death or great bodily injury. To establish imperfect self-defense, it must be shown that the defendant had an " 'honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury.' " (*In re Christian S.* (1994) 7 Cal.4th 768, 773, italics omitted.)

The surveillance footage shows DelaCruz standing near the wall as the pushing and shoving began. With the exception of Julie Ha, every other witness testified that DelaCruz never threw a punch at anyone or engaged in the fight in any way; rather, he pleaded with everyone to stop fighting.

The surveillance video shows Le walking to the parking lot before the altercation begins, then sprinting back to the crowd with his hand tucked against his waist. He pushed his way into the group, then was pushed back by one or more people. Ha said she was using both hands to restrain Le and keep him from hitting other people. The conflict appeared to subside, but flared up again when a member of Le's group hit or shoved Sam. At this point, Le pulled out his gun and threatened to "shoot the heck out of" Sam's group. DelaCruz was stabbed in the side by someone from Le's group and Le shot him in the stomach. A few seconds later, as DelaCruz was lying on the ground, Le returned and shot him once more in each leg.

The evidence showed it was Le's group that instigated the conflict, inviting Sam to go outside, angrily confronting him about calling one of the women in their group a bitch, and challenging him to fight "to [the] death." Le's group began the shouting, initiated the pushing and either pushed or punched Sam. Someone in Le's group, armed with a knife, stabbed DelaCruz just before Le pulled out his gun and fired the fatal shot.

The only evidence which showed DelaCruz posed *any* sort of threat to Le was Ha's conflicting testimony about DelaCruz's actions. Ha told police DelaCruz punched Le, but then disavowed that statement, saying that DelaCruz swung his arm in Le's direction, though Le was too far away for DelaCruz to connect. She also could not recall if DelaCruz's hand was open or closed at the time. Meanwhile, the surveillance tape, admittedly indistinct, does not show DelaCruz swinging at anyone, and none of the other witnesses, including Quach, said they saw DelaCruz acting aggressively in any way.

Furthermore, while the jury was not directly instructed that Le's mental impairment could be considered in evaluating his belief in the need for self-defense, the instructions given did not preclude the jury from considering that impairment in connection with the issue of self-defense. We look to the universe of instructions issued to the jury to gauge their propriety. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) In this case, the jury was properly instructed that it could find Le acted in imperfect self-defense if it found he actually believed he was in imminent danger of death or great bodily injury and actually believed he had to use force to defend himself.

We conclude that, even if his counsel had requested an instruction directly tying evidence of Le's mental condition to his defense of imperfect self-defense, there was no substantial evidence supporting the giving of such an instruction. (*People v. Williams* (1997) 16 Cal.4th 635, 677.) In addition, the jury was instructed that it could consider the effects of Le's mental impairment in deciding whether he could form the specific intent to kill. As a result, the jury reasonably considered whether Le's mental condition could cause an unreasonable belief in the need for self-defense. Accordingly, it is not reasonably probable a more favorable determination would have resulted had counsel requested a specific instruction on the relevance of Le's mental impairment, if any, to Le's imperfect self-defense theory, and Le has not shown that he was prejudiced by the claimed ineffective assistance of counsel. (See *Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688; *People v. Price*, *supra*, 1 Cal.4th at p. 440.)

B. Failure to include instructions on absence of heat of passion and imperfect self-defense

Le argues the trial court was required to expressly instruct the jury that the prosecution must prove the absence of provocation and imperfect self-defense as an element of murder. We disagree.

1. Background

Before issuing specific instructions about murder and manslaughter, the trial court instructed the jury that "[m]urder and manslaughter are types of homicide. The defendant is charged with murder. Manslaughter is a lesser offense to murder. And I'll tell you how you treat all these in a minute. A homicide can be lawful or unlawful. If a person kills with a legally valid excuse or justification, the killing is lawful, and he or she has not committed a crime. [¶] If there is no legally valid excuse or justification, the killing is unlawful and *depending on the circumstances the person is guilty of either murder or manslaughter*. You must decide whether the killing in this case was unlawful and if so what specific crime was committed." (Italics added.)

The jury was instructed on the degrees of murder, as well as on the principles of express and implied malice. It was also instructed in detail on the manner in which provocation and imperfect self-defense reduce murder to manslaughter. The court instructed that "malice aforethought" was necessary to find the killing a murder, but that "[t]here is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend oneself."

Finally, the court instructed the jury that "[t]he People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." The court later instructed the jury that "[the] People have the burden of proving beyond a reasonable doubt that the defendant was not acting

in imperfect self defense or imperfect defense of another. If the People have not met this burden, you must find the defendant not guilty of murder."

2. Analysis

Relying on *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704 (*Mullaney*), Le argues that when a factual circumstance negates an element of the crime, as heat of passion and imperfect self-defense negate malice, due process requires the prosecution to prove the absence of that circumstance beyond a reasonable doubt.

The Maine law under consideration in *Mullaney* provided that, absent justification or excuse, all intentional or criminally reckless killings were presumed to be murder, unless the *defendant* proved that the killing was committed in the heat of passion. (*Mullaney*, *supra*, 421 U.S. at pp. 691-692.) Thus, the People benefited from a statutory presumption that *all* homicide was murder, and punishable as such by life imprisonment. The Supreme Court found this particular presumption, which is at odds with the traditional view of the burden of proof in a criminal case, unconstitutional. (*Id*. at p. 704.) In *Patterson v. New York* (1977) 432 U.S. 197, 215, the Supreme Court clarified this point when it cautioned that all *Mullaney* held was that the state must prove "every ingredient of an offense" and that it cannot shift to the defendant any part of that burden by means of a presumption. We have no such improper burden-shifting here.

Le also relies on a dissent in *People v. Breverman* (1998) 19 Cal.4th 142, 154 to support his claim the jury must be instructed that the absence of heat of passion or imperfect self-defense is an element of murder which must be proved by the People beyond a reasonable doubt. In *Breverman*, our Supreme Court held that, in a murder case, the failure to instruct on the lesser included offense of voluntary manslaughter when supported by the evidence is state law error alone. Justice Kennard's dissent opined that, where evidence of provocation exists in a murder case, the absence of provocation is an element of the murder charge and the trial court errs by failing to "instruct the jury that one who kills in the heat of passion lacks malice and is therefore not guilty of murder."

(*Id*. at p. 187 (dis. opn. of Kennard, J.).) From this hypothesis, Justice Kennard concluded that failure to instruct on voluntary manslaughter was not only an error of state law, but also of federal constitutional dimension. However, a dissenting opinion in a California Supreme Court case is not controlling authority. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 829.)

People v. Rios (2000) 23 Cal.4th 450 (*Rios*), which Le also cites, is equally unavailing. In *Rios*, the defendant was acquitted of murder in his first trial, with the jury being unable to reach a verdict on the lesser included offense of voluntary manslaughter. On retrial, the defendant was tried and convicted of voluntary manslaughter. (*Id*. at p. 454.) At issue on appeal was the omission of the elements of provocation and imperfect self-defense in the voluntary manslaughter instruction. (*Id*. at pp. 458-459.) The court rejected this assignment of error because "provocation and imperfect self-defense are not elements of voluntary manslaughter when, as here, the defendant faces only that charge." (*Id*. at pp. 462-463.) "Heat of passion or imperfect self-defense *precludes* a finding of malice *where malice is an element of the charge*, but *malice* is *not at issue* upon a charge of manslaughter. The charge of voluntary manslaughter *absolves* the People of proving that malice was present. It does not require the prosecution to establish, beyond reasonable doubt, that *malice was absent*." (*Id*. at p. 463.)

The *Rios* court also pointed out that heat of passion and imperfect self-defense are mitigating circumstances that negate the element of malice required for murder. (*Rios*, *supra*, 23 Cal.4th at p. 461.) In dicta, the court noted that, in murder cases, evidence of heat of passion or imperfect self-defense is relevant on the issue of whether the defendant acted with malice and thus committed murder, or without malice and thus committed the lesser offense of voluntary manslaughter. "In such cases, the People may have to prove the *absence* of provocation, or of any belief in the need for self-defense, in order to *establish* the *malice element of murder*." (*Id*. at p. 454.) In this regard, the court also observed: "[W]here the defendant killed intentionally and unlawfully, evidence of heat

of passion, or of an actual, though unreasonable, belief in the need for self-defense, is relevant only to determine whether *malice has been established*, thus allowing a conviction *of murder*, or *has not been established*, thus precluding a murder conviction and limiting the crime to the lesser included offense of voluntary manslaughter. Indeed, in a murder case, unless the People's own evidence suggests that the killing may have been provoked or in honest response to perceived danger, it is the *defendant*'s obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder. [Citations.] [¶] If the issue of provocation or imperfect self-defense is thus 'properly presented' in a murder case [citation], the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice." (*Id.* at pp. 461-462.)

Even if they were not dicta, these two excerpts from *Rios* fall far short of imposing a sua sponte obligation on trial courts to instruct that the absence of provocation and imperfect self-defense are elements of murder, as Le urges. What these excerpts stand for is that there may be circumstances in which evidence of the absence of provocation is a factual predicate for establishing an element of murder, not that such circumstances are present in every murder case.

We also note that CALCRIM Nos. 570 and 571 support the notion that the absence of provocation and imperfect self-defense are not elements of murder but instead become relevant when there is some question whether a particular homicide is murder or manslaughter. These instructions make clear that it is the People's burden to prove beyond a reasonable doubt that the defendant did not kill the victim either "as the result of a sudden quarrel or in the heat of passion" (CALCRIM No. 570) or while "acting in [imperfect self-defense]" (CALCRIM No. 571). The instructions also make clear that if the People fail to meet this burden, the jury must find the defendant *not guilty* of murder. (CALCRIM Nos. 570, 571.)

We find no basis to conclude the jury misinterpreted the instructions as given by the court or was confused in any manner as to who bore the burden of proving that Le did not act because of a sudden quarrel or with an actual but unreasonable belief in the need to defend himself. As noted, the court instructed the jury that the prosecution had the burden of proving Le guilty beyond a reasonable doubt. The jury was made aware that to find Le guilty of murder, the prosecution had to prove he acted with malice, and that malice is absent if the killing occurred as the result of a sudden quarrel or due to the actual but unreasonable belief in the necessity to defend one's self. Given these instructions, we fail to see how the jury could have jumped to the conclusion that the prosecution did not have the burden of proving Le did not act with an actual but unreasonable belief in the need to defend himself.

Moreover, the instructions informed the jury that to convict Le of voluntary manslaughter, the prosecution had to prove the homicide was unlawful. The instructions given here advised that the prosecution had to prove the homicide was unlawful beyond a reasonable doubt. Furthermore, if the instructions were susceptible of the interpretation Le now asserts, defense counsel likely would have objected at trial on this basis. The lack of any such objection suggests that " 'the potential for [confusion] argued now was not apparent to one on the spot.' " (*People v. Keenan* (1988) 46 Cal.3d 478, 535.)

C. Mutual combat instructions

Le claims the court erred in giving CALCRIM Nos. 3471 and 3472 because there was no evidence to support either of these instructions. After instructing the jury that the People had the burden to prove beyond a reasonable doubt that Le was not acting with an honest but unreasonable belief in the need to defend himself or another person, the court gave these two instructions.

CALCRIM No. 3471 explains the doctrine of self-defense in the context of mutual combat. As given, the instruction provided, "A person who engages in mutual combat who is the initial aggressor has the right to self defense only if one, he actually and in

good faith tries to stop fighting and two, he indicates by word or conduct to his opponent in a way that a reasonable person would understand that he wants to stop fighting and that he has stopped fighting. And three, he gives his opponent a chance to stop fighting. [¶] If a person meets these requirements, he has [a] right to self defense if the opponent continues to fight. A fight is a mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self defense arose. If you decide the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting."

CALCRIM No. 3472, as given, further provided, however, that "[a] person does not have a right to self defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

In *People v. Ross* (2007) 155 Cal.App.4th 1033 (*Ross*), this court explained the term "mutual combat" as used in the jury instruction. "Old but intact case law confirms that as used in this state's law of self-defense, 'mutual combat' means not merely a reciprocal exchange of blows but one *pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities*. The lead case appears to be *People v. Fowler* (1918) 178 Cal. 657, 671 . . . , where the court wrote, 'It has long been established that one who *voluntarily engages* in mutual combat with another must have endeavored to withdraw therefrom before he can be justified in killing his adversary to save his own life. . . . Both before and since [the 1872 enactment of Penal Code section 197] the phrase "mutual combat" has been in general use to designate the branch of the law of self-defense relating to homicides committed in the course of *a duel or other fight begun or continued by mutual consent or agreement, express or implied*. [Citations.]' [Italics added in *Ross*.] In other words, it is not merely the *combat*, but the *preexisting intention to engage in it*, that must be mutual." (*Id*. at p. 1045.) Thus, we held that "

'mutual combat' consists of fighting by mutual intention or consent, as most clearly reflected in an express or implied *agreement* to fight." (*Id*. at pp. 1046-1047.) "[T]here must be evidence from which the jury could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose*." (*Id*. at p. 1047.)

Le claims that there was no evidence of mutual combat, that is, a " '*fight begun or continued by mutual consent or agreement, express or implied*.' " (*Ross, supra*, 155 Cal.App.4th at p. 1045.) The arguing, pushing and shoving outside the restaurant did not amount to mutual combat, and there was considerable evidence that the parties had no expectation of fighting. Further, Ha testified that DelaCruz threw the first punch, and no one testified that Le initiated any sort of altercation.

Le also contends that there was no factual basis for issuing CALCRIM No. 3472 to the jury, which instructs that the right to self-defense cannot be contrived. The evidence showed only that two people in Le's group asked Sam to step outside and that someone in his group punched or pushed Sam during the ensuing argument.

Assuming that Le's arguments in this regard are not forfeited due to his failure to object below,[5] the arguments are without substantive merit.

The altercation began when people at Le's table learned that Sam supposedly called Quach a bitch on a prior occasion. Le and another of his friends went outside, where Le presumably retrieved a gun from his car. Two members of Le's group walked over to Sam and asked him to accompany them outside. The three men were soon joined by their other friends and there was, by all accounts, a lot of screaming and swearing back and forth, in English and Vietnamese. The surveillance video shows Le running back from the parking lot, his hand close to his abdomen, and rejoining his friends. Someone in Le's group challenged Sam to fight "to the death" and threatened to hit him

[5] *People v. Geier* (2007) 41 Cal.4th 555, 579.

"until his mother pass away." Ha said that the two groups were pushing each other back and forth, and she saw DelaCruz swing his arm at someone in the other group, just before he was shot. The surveillance video shows a brief melee just prior to Le shooting DelaCruz. Quach said that she walked outside and intended to leave because she thought there would be a fight.[6]

Such a view of the evidence supports the court's instruction on mutual combat because the actions of Le's group and the response by Sam's group reasonably supports an inference that Le's group challenged Sam's group to fight and that Sam's group, at least initially, accepted that challenge. The evidence also supports the contrived self-defense instruction because it shows that Le's group sought to provoke the altercation with Sam's group as an excuse to use force.

Furthermore, even assuming the instructions were given in error, Le is only entitled to a reversal of the judgment against him if there is a " ' "reasonable probability" ' " he could have obtained a better result without the instructions being given. (*Ross, supra,* 155 Cal.App.4th at p. 1055.) The mutual combat and contrived self-defense instructions would only have affected the outcome if the jury found that Le was acting in self-defense, but there is simply insufficient evidence to support such a finding. DelaCruz was shot and killed because Le, for some reason, thought it necessary to bring a gun to the fight his friends started. The only two people who used any weapons during the fight were Le, who used his gun, and an unidentified friend of Le's, who stabbed DelaCruz. There was no evidence that DelaCruz, at any time, presented a deadly threat to Le or any of his friends. The instructions could not have prejudiced Le's case.

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[6] Quach also testified that she thought the parties would only argue and perhaps engage in a little shoving, but nothing more serious. In deciding whether there is substantial evidence to warrant an instruction, the court does not determine the credibility of the evidence. (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

D. Cumulative error

Le argues that the cumulative effect of the asserted errors deprived him of his right to due process under the federal Constitution. The California Supreme Court has instructed that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Since we have rejected each of Le's claims of error, there is no occasion to evaluate cumulative error.

III. DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Bamattre-Manoukian, J.